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NOTES

AMERICAN ANTITRUST LIABILITY OF FOREIGN STATE INSTRUMENTALITIES: A NEW APPLICATION OF THE *PARKER* DOCTRINE

The impact of foreign commercial enterprise on the American economy has increased dramatically in recent years.¹ Much of this increase reflects the efforts of private foreign companies.² But the expanded role of national governments in conducting traditionally private commercial enterprises³ has also contributed to the assault on the American market,⁴ raising the question of whether the actions of foreign governments and their instrumentalities are immune from U.S. antitrust laws.⁵

This Note will first examine those cases that have considered the extraterritorial application of the antitrust laws against foreign governments and their instrumentalities. Recent applications of the state action doctrine,⁶ which generally grants antitrust immunity to governmental activities, will

1. The U.S. foreign trade deficit for 1977 was \$26.7 billion, more than four times the 1976 figure of \$5.9 billion and \$20.3 billion above the previous record of \$6.4 billion set in 1972. N.Y. Times, Jan. 31, 1978, at 1, col. 1. The foreign trade deficit for February 1978 was \$4.52 billion, the largest monthly deficit in American history. N.Y. Times, Apr. 1, 1978, at 1, col. 1 (city ed.). See generally INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT 20-27 (1977).

2. Foreign direct investment in the United States rose \$2.5 billion, or nine percent, in 1976, to \$30.2 billion. This has been attributed to "the recovery of the American economy as well as recent changes in relative costs of production that have made the United States a more attractive location for foreign investment." [1977] BALANCE OF PAYMENTS REP. (CCH) ¶ 9292.

3. The Organization of Petroleum Exporting Countries (OPEC) is the leading recent example of this phenomenon. See Note, *I.R.C. Section 999: Taxing the Arab Boycott*, 10 CORNELL INT'L L.J. 280, 280 & nn.1-4. For an attempt to measure the economic effect of OPEC pricing policies on other nations, see Lea, *Worldwide Financial Implications of Higher Oil Prices*, BRITISH-NORTH AMERICAN COMMITTEE, HIGHER OIL PRICES: WORLDWIDE FINANCIAL IMPLICATIONS 1 (1975). See also Barraclough, *International Reactions to the Problems of the Steel Trade*, 77 DEP'T STATE BULL. 742, 745-46 (Nov. 21, 1977). The expanded role of governments in formerly private economic activity was noted in *Pfizer, Inc. v. Government of India*, 98 S. Ct. 584, 593 (1978) (Burger, C.J., dissenting).

4. See Barraclough, *supra* note 3, at 745-50. Authorities disagree on whether government assistance actually helps foreign industries in international markets. Compare Briggs, *Steel Imports: They're Your Problem Too!*, 44 VITAL SPEECHES 73, 75 (Nov. 15, 1977) with Barraclough, *supra* note 3, at 746, 750.

5. The basic provisions of American antitrust law are contained in the Sherman Act, 15 U.S.C. §§ 1-7 (1976) and the Clayton Act, 15 U.S.C. §§ 12-27 (1976).

6. See notes 29-65 *infra* and accompanying text.

be considered, and an analytic framework will be proposed for assessing the potential antitrust liability of governmental entities. The Note will then adapt this analysis to the international setting, consider the implications of the Foreign Sovereign Immunities Act of 1976,⁷ and apply the proposed immunity analysis to a hypothetical case.

I

AMERICAN ANTITRUST LAW AND FOREIGN GOVERNMENTS

There have been few attempts to apply American antitrust laws against foreign sovereigns and their instrumentalities or against private conspiracies that were furthered by acts of foreign governments. The courts that have considered the issue have not agreed on a rule governing the liability of foreign sovereigns. This lack of consensus is illustrated by two cases in which a foreign government was a party to an alleged conspiracy in restraint of trade: *United States v. Deutsches Kalisyndikat Gesellschaft*⁸ and *In re Investigation of World Arrangements*.⁹

In *Deutsches Kalisyndikat*, the United States alleged antitrust violations by the Société Commercial des Potasses d'Alsace, an enterprise established by the French Government to sell potash and owned jointly by the Government and private parties.¹⁰ The French Ambassador invoked the doctrine of foreign sovereign immunity and urged the district court to quash service of process upon the Société.¹¹ In denying the claim of immunity and upholding service,¹² the court emphasized both the partly private ownership and operation of the Société,¹³ and the fact that persons other than the sovereign or its representative had engaged in anticompetitive acts within the United States.¹⁴

7. 28 U.S.C. §§ 1602-1611 (1976).

8. 31 F.2d 199 (S.D.N.Y. 1929).

9. 13 F.R.D. 280 (D.D.C. 1952).

10. 31 F.2d at 202. The French Government owned eleven-fifteenths of the capital stock and controlled the Société's governing board. *Id.* at 200.

11. *Id.* at 201.

12. *Id.* at 203.

13. See note 10 *supra*.

14. 31 F.2d at 201. The emphasis that the court placed on acts within the jurisdiction of the United States may be attributable to the fact that the case antedated by sixteen years *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). In that case Judge Learned Hand cast aside the longstanding rule that allegedly unlawful antitrust conspiracies must be formed or to some extent be carried out within the United States. See generally Simson, *The Return of American Banana: A Contemporary Perspective on American Antitrust Abroad*, 9 J. INT'L L. & ECON. 233, 235-41 (1974). Cf. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1335 (2d Cir. 1972) (telephone calls and mail to the United States constitute conduct within the United States for jurisdictional purposes where violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), are alleged).

World Arrangements produced the opposite result. During a grand jury investigation of possible Sherman Act violations by multinational oil companies, the court concluded that the British Government's stock holdings in the Anglo-Iranian Oil Company rendered the company immune from jurisdiction,¹⁵ despite the fact that the Government's share of the total stock in the company was smaller than that of the French Government in *Deutsches Kalisyndikat*.¹⁶ Since the court discerned no conceptual differences between the two cases, it distinguished them on their facts, stating that "[t]here is a vast distinction between a seafaring island-nation maintaining a constant supply of maritime fuel and a government seeking additional revenue in the American markets and causing a direct injury in the United States to our domestic commercial structure."¹⁷

More consistent in their results, but no more decisive on the issue of anti-trust liability of foreign sovereign instrumentalities, are several cases in which the foreign government furthered the challenged activity, but did not participate in it. The defendants in *United States v. Sisal Sales Corp.*¹⁸ secured passage of legislation in Mexico that effectively eliminated from the sisal market all selling agents other than the defendants' corporation.¹⁹ In

15. *In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (D.D.C. 1952); cf. *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298, 319 (D.D.C. 1960) (suggesting that "[t]he present case seems to fall somewhere in between the *World Arrangements* and the [*Deutsches Kalisyndikat*] *Gesellschaft* cases."). The district court in the *Shipping Industry* case was able to resolve the jurisdictional issue by finding that the defendants' activities were "commercial" and therefore were not immune from the antitrust laws. *Id.* This made it unnecessary to consider the extent of the Government's involvement in the activity and the effects of that involvement on jurisdiction.

16. In *World Arrangements*, the British Government held only "slightly better than one-third of the capital investment" of Anglo-Iranian, 13 F.R.D. at 290, compared to the eleven-fifteenths interest held by the French Government in *Deutsches Kalisyndikat*, see note 10 *supra*. The *World Arrangements* court sought to deemphasize this smaller share by stressing that it was still sufficient to control the corporation. 13 F.R.D. at 290.

17. *Id.* at 291. The court also distinguished *Deutsches Kalisyndikat* on the ground that the alleged antitrust violations involved commercial activity rather than a governmental function as in *World Arrangements*. *Id.* However, the *World Arrangements* court had earlier defined the governmental nature of Anglo-Iranian's function by reference to the test stated in *Berizzi Bros. v. The Pesaro*, 271 U.S. 562, 574 (1926), which provided that merchant ships "held and used by a [foreign] government for a public purpose" will be immune from U.S. jurisdiction. 13 F.R.D. at 290. Using that standard, the Société's activities in *Deutsches Kalisyndikat* would certainly have qualified as "governmental" and therefore been immune. But see Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976); notes 95-101 *infra* and accompanying text.

18. 274 U.S. 268 (1927).

19. *Id.* at 273. See also *United States v. Bechtel Corp.*, [1977] 5 TRADE REG. REP. (CCH) ¶ 50,304 (proposed consent judgment). The government action in *Bechtel*, although indirect, was necessary to a conspiracy of private parties who refused to deal with subcontractors on the Arab blacklist and required subcontractors not to do business with other blacklisted persons. Unlike the *Sisal Sales* conspiracy, the *Bechtel* scheme was instigated by foreign governments, which required the private parties to cooperate as a condition of doing business in Arab nations. ANTITRUST & TRADE REG. REP. (BNA) No. 762 at F-1, F-2 (1976).

Continental Ore Co. v. Union Carbide & Carbon Corp.,²⁰ the Canadian Governor General appointed the defendants' wholly owned subsidiary as the Government's exclusive agent for the purchase of certain metals during World War II. The subsidiary allegedly used its power to benefit its parent and exclude competitors from the market.²¹ *United States v. Watchmakers of Switzerland Information Center*²² involved the Swiss Government's financial²³ and legislative²⁴ assistance to the beleaguered Swiss watch industry's efforts to protect itself against competition.

In each of these cases, the court held that the foreign government's conduct did not shield private defendants from antitrust liability;²⁵ but the legality of the actions of the governments was not put in issue.²⁶ The only recent challenge to anticompetitive activity of foreign government instrumentalities was the action brought by the Justice Department in *United States v. Pan American World Airways, Inc.*²⁷ That case, however, was settled by consent decree,²⁸ so the issue of the antitrust liability of foreign government entities remains open. Where foreign government instrumentalities have restrained trade, the courts have reached conflicting conclusions; and where foreign governments have furthered private restraints, courts have limited their consideration of the liability issue to the private defendants. To determine whether foreign governments and their instrumentalities may be liable for violating the U.S. antitrust laws, it is therefore necessary to examine the status of domestic state governments and their

20. 370 U.S. 690 (1962).

21. *Id.* at 695.

22. [1963] Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified*, [1965] Trade Cas. ¶ 70,352 (S.D.N.Y. 1965).

23. The Swiss Government contributed money to the holding company, the Société Générale de L'Horlogerie Suisse S.A. (ASUAG), which took control of all firms producing certain watch components. The Government also acquired a minority of ASUAG's stock and minority representation on its board of directors. [1963] Trade Cas. ¶ 70,600, at 77,428.

24. The Swiss Government approved the protective effect of the Watchmakers' Convention by enacting legislation that conditioned issuance of export permits for watch components on compliance with the convention. *Id.*

25. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927); *United States v. Watchmakers of Switz. Information Center*, [1963] Trade Cas. ¶ 70,600, at 77,456-57 (S.D.N.Y. 1962).

26. The *Continental Ore* Court emphasized that Continental did not question the Canadian Government's delegation of power to Union Carbide's subsidiary. 370 U.S. at 702-03 n.11, 706.

27. No. 77-197 (D.D.C., filed Feb. 3, 1977), [1977] 4 TRADE REG. REP. (CCH) ¶ 45,077 (case no. 2560, 2561) (complaint noted). The Justice Department asserted that agreements setting prices for military excursion fares among international air passenger carriers, including Luft-hansa German Airlines, constituted illegal price fixing. The Justice Department has indicated its strong commitment to an antitrust policy that protects the American consuming public. ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 4 (1977), *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1 (1977) and TRADE REG. REPORTS (CCH) No. 266, pt. II (1977). *See also* Davidow, *Recent Developments in International Antitrust*, 10 AKRON L. REV. 603 (1977).

28. [1977] 5 TRADE REG. REP. (CCH) ¶ 50,353 (D.D.C., filed Dec. 9, 1977).

instrumentalities and to develop an analysis applicable in the international field.

II

STATE ACTION AND ANTITRUST IMMUNITY

A. THE *Parker* DOCTRINE

Although few antitrust suits have involved foreign states, many suits have been brought against domestic states and their instrumentalities. In the leading case, *Parker v. Brown*,²⁹ and several recent decisions, including *City of Lafayette v. Louisiana Power & Light Co.*,³⁰ *Goldfarb v. Virginia State Bar*,³¹ and *Bates v. State Bar of Arizona*,³² the Supreme Court has outlined the scope of antitrust immunity. The Court has applied *Parker* to various types of governmental bodies, tailoring its analysis to the differences in the factual patterns presented. Although it did not involve a governmental body, *Cantor v. Detroit Edison Co.*³³ is also instructive on the question of antitrust immunity. In addition, the Supreme Court held in *Pfizer, Inc. v. Government of India*³⁴ that foreign states may bring antitrust suits for treble damages,³⁵ indicating a willingness to treat foreign and domestic states similarly for some purposes.³⁶ This suggests that, although domestic application of the antitrust laws cannot parallel international application perfectly,³⁷ future developments in international antitrust law may involve

29. 317 U.S. 341 (1943). The first case to raise this issue was *Olsen v. Smith*, 195 U.S. 332 (1904), which involved a challenge to Texas statutes limiting employment as port pilots to those licensed by the state. The Court held that "no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law." *Id.* at 345.

30. 98 S. Ct. 1123 (1978).

31. 421 U.S. 773 (1975).

32. 433 U.S. 350 (1977).

33. 428 U.S. 579 (1976).

34. 98 S. Ct. 584 (1978).

35. *Id.* at 591. The Court in *Pfizer* held that foreign sovereigns were "persons" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). 98 S. Ct. at 588-90. *Cf.* S. 2395, 95th Cong., 2d Sess., 124 CONG. REC. S28 (daily ed. Jan. 19, 1978) (limiting recovery by foreign states in antitrust suits to actual damages); S. 2486, 95th Cong., 2d Sess., 124 CONG. REC. S1190 (daily ed. Feb. 6, 1978) (barring standing of foreign sovereigns to sue under American antitrust law except where (1) the sovereign recognizes general rights of U.S. persons and U.S. Government to bring civil suits in that country's courts, and (2) the sovereign has laws prohibiting restrictive trade practices); S. 2724, 95th Cong., 2d Sess., 124 CONG. REC. S3461 (daily ed. Feb. 6, 1978) (foreign sovereigns will have standing in U.S. courts only if U.S. persons and U.S. Government have equivalent access and relief for the same injury in the courts of the foreign sovereign).

36. *Georgia v. Evans*, 316 U.S. 159 (1942), held that domestic states were "persons" within the meaning of § 7 of the Sherman Act. Congress has since repealed that section because it duplicated § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282.

37. See notes 86-91 *infra* and accompanying text.

application of current domestic doctrines.³⁸

In *Parker v. Brown*³⁹ plaintiffs alleged that the efforts of the State of California to control the marketing of the state's raisin crop violated the Sherman Act. Determining that Congress had not intended the Sherman Act to apply to restraints of trade imposed by a state acting as sovereign, the Supreme Court held that California's program did not violate the antitrust laws.⁴⁰ The Court warned that this immunity did not extend to a state participating in an essentially private scheme to restrain trade,⁴¹ or to private parties whose actions the state had merely authorized or declared to be lawful.⁴² But formal action by the state itself to create the restraint of trade would immunize the state from antitrust attack.⁴³

*City of Lafayette v. Louisiana Power & Light Co.*⁴⁴ presented the question of whether cities share this immunity from the antitrust laws. Two cities owned and operated electric utilities serving customers both within and beyond the city limits. One of the cities competed in the latter market with the Louisiana Power & Light Company, and, to improve its position, allegedly tied gas and water service for nonresident customers to the purchase of electricity. Also, both cities allegedly engaged in sham litigation against Louisiana Power & Light to delay approval and construction of a new electric generating plant. Although *Parker* held that restraints of trade imposed by a state acting as sovereign were not barred by the antitrust laws, the Court decided in *City of Lafayette* that "in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to 'the state[s]' command,' or to be restraints that 'the state . . . as sovereign' imposed."⁴⁵ In other words, "when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws."⁴⁶

38. The pattern of development in this area has been for the Court to decide first whether a particular governmental body may bring suit under the antitrust laws, and then whether it may also be sued. Compare *Georgia v. Evans*, 316 U.S. 159 (1942) (state may bring suit) with *Parker v. Brown*, 317 U.S. 341 (1943) (state may not be sued); compare also *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (city may bring suit) with *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123 (1978) (city may be sued). If this pattern continues, the Court, following its decision in *Pfizer*, may eventually have to decide whether foreign governments may be sued under U.S. antitrust laws. It is likely to base its decision on cases involving the antitrust liability of domestic governmental bodies.

39. 317 U.S. 341 (1943).

40. *Id.* at 352.

41. *Id.* at 351-52. See, e.g., *Harman v. Valley Nat'l Bank of Ariz.*, 339 F.2d 564, 566 (9th Cir. 1964) (state attorney general alleged to be co-conspirator in scheme to monopolize commercial banking and finance in state).

42. 317 U.S. at 351.

43. *Id.* at 352.

44. 98 S. Ct. 1123 (1978).

45. *Id.* at 1137 (quoting *Parker*).

46. *Id.* at 1138.

Both *Goldfarb v. Virginia State Bar*⁴⁷ and *Bates v. State Bar of Arizona*⁴⁸ involved antitrust charges against state bar associations.⁴⁹ The Court applied a stricter test than in *City of Lafayette* to decide the claims of immunity, apparently because such associations are further removed from the state than are municipalities. In *Goldfarb*, the Court noted that, although the Virginia Supreme Court had delegated supervisory power over the state's legal profession to the bar association,⁵⁰ there was nothing to suggest that the Virginia court had required or even approved a violation of the antitrust laws.⁵¹ Despite the bar association's position as a state agency under Virginia law,⁵² the Supreme Court found that it was a state agency only for limited purposes—purposes that did not “allow it to foster anticompetitive practices for the benefit of its members.”⁵³ Because the bar association was not equivalent to the state, and since the state had not imposed the challenged restraint of trade, the bar association was open to antitrust attack.

By contrast, the challenged restraint in *Bates* resulted from an “affirmative command of the Arizona Supreme Court, . . . the ultimate body wielding the State's power over the practice of law.”⁵⁴ This command sprang from “the State's power to protect the public”⁵⁵ and contained “a clear articulation of the State's policy with regard to professional behavior.”⁵⁶ Because the Arizona court could be considered to be the state acting as sovereign, the Arizona bar association's implementation of the challenged restraint enjoyed immunity from antitrust attack.⁵⁷ The Supreme Court indicated, however, that it might have reached a different result had the Arizona court simply authorized the implementation of such a restraint, rather than commanded it.⁵⁸ Thus, the test applicable to bodies such as bar associations is more stringent than that applicable to municipalities,⁵⁹ for

47. 421 U.S. 773 (1975).

48. 433 U.S. 350 (1977).

49. In *Goldfarb*, the alleged violation was the imposition and enforcement of a minimum fee schedule. 421 U.S. at 775. *Bates* involved a ban on lawyer advertising. 433 U.S. at 353.

50. 421 U.S. at 776.

51. Cf. *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977) (issuance of ethical opinions by bar association compelled by the Commonwealth of Virginia through its Supreme Court did not fall within state action exemption to antitrust laws).

52. 421 U.S. at 789-90.

53. *Id.* The Court found that the bar association had “voluntarily joined in what [was] essentially a private anticompetitive activity . . .” *Id.* at 792. See note 41 *supra* and accompanying text.

54. 433 U.S. at 360.

55. *Id.* at 361.

56. *Id.* at 362. The Court also noted that the rule was “subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings.” *Id.*

57. *Id.* at 359-60.

58. *Id.*

59. See text accompanying notes 45-46 *supra*.

which state authorization is sufficient.

Had Detroit Edison, the defendant in *Cantor*,⁶⁰ been a governmental body, it too might have enjoyed antitrust immunity.⁶¹ The Michigan Public Service Commission had approved the anticompetitive practice with which the company was charged,⁶² and state law required Detroit Edison to continue the practice while that approval remained in effect.⁶³ But Detroit Edison was a privately owned company, and the Supreme Court rejected its claims of immunity because the Public Service Commission had not imposed the challenged restraint of trade. Rather, the option to initiate it had been Detroit Edison's.⁶⁴ The Court also emphasized that the alleged anticompetitive practice did not further any important state policies.⁶⁵ The test applicable to private entities thus appears to be even more stringent than that for bodies such as bar associations: unless the restraint has been imposed by the state to promote important state policies, the private entity implementing it will enjoy no immunity.

This series of cases outlines the antitrust liability of domestic states and their instrumentalities. By focusing on the nature of the defendant charged with violating the antitrust laws, and by applying the appropriate test for immunity, it should be possible to decide whether that defendant will be subject to liability or will instead enjoy *Parker's* protection. It is therefore necessary to examine both which characteristics of a party determine the test to be applied and what is needed to satisfy each of these tests.

B. A PROPOSED ANALYSIS

The succession of recent *Parker* doctrine cases has replaced the basic *Parker* analysis with a series of fact-oriented immunity tests. Analysis of cases in which a governmental entity asserts state action immunity is, as a result, a two-step process: a determination of which test applies and an evaluation of whether it has been satisfied. The choice of a proper test requires examining the closeness of the relationship between the defendant and the ultimate sources of sovereign authority. The possibilities are broadly divisible into three groups.

*Ultimate governmental bodies*⁶⁶ wield the full authority of the state. This

60. 428 U.S. 579 (1976).

61. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) ("Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party.").

62. Detroit Edison had instituted a program that tied the distribution of light bulbs to the sale of electricity. 428 U.S. at 582.

63. *Id.* at 585.

64. *Id.* at 594.

65. *Id.* at 585.

66. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977) (the Arizona Supreme Court "is the ultimate body wielding the State's power over the practice of law . . .").

group encompasses (a) the state legislature and statutory agencies;⁶⁷ (b) the state executive and executive departments;⁶⁸ and (c) the state judiciary.⁶⁹ In most cases, then, ultimate governmental bodies are identical with the sovereign.

*Subordinate governmental bodies*⁷⁰ derive their authority from an ultimate governmental body. They include: (a) state governmental subdivisions⁷¹ and their instrumentalities⁷²—typically local or regional governmental entities whose authority is expressly limited to that delegated to them by an ultimate governmental body; (b) state agencies for limited purposes⁷³—private organizations that assume the full power and authority of the state in order to carry out specific and limited purposes; and (c) governmental proprietary enterprises⁷⁴—enterprises owned and operated by the government that generate goods or services usually provided by private enterprise. Due to the great variety of their activities, the relation of subordinate governmental bodies to the sovereign ranges from close to very distant.

Nongovernmental bodies are private organizations, such as privately held utilities, to which governmental authority has been delegated.⁷⁵ As a result, their relation to the sovereign is usually highly attenuated.

67. See *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904) (state legislative enactment permitting only duly authorized agents to render pilotage services is not subject to antitrust laws). See also *Anderson v. Commission on Special Revenue*, [1977] 2 Trade Cas. ¶ 61,726 (Conn. Super. Ct. Nov. 15, 1977) (restrictive contracts made by state commission are not subject to state antitrust laws).

68. See *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 370 n.15 (9th Cir. 1974) (antitrust suit by state against asphalt suppliers is state action).

69. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). For a detailed discussion of these cases, see notes 47-59 *supra* and accompanying text.

70. *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123, 1138 (1978).

71. *Id.*

72. See, e.g., *Kurek v. Pleasure Driveway and Park Dist.*, 557 F.2d 580 (7th Cir. 1977) (action of subordinate governmental body not automatically state action), *vacated*, 46 U.S.L.W. 3664 (U.S. Apr. 25, 1978) (No. 77-440) (remanded for further consideration in light of *City of Lafayette*).

73. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (state bar association is a state agency for limited purposes); *City of Fairfax v. Fairfax Hosp. Ass'n*, 562 F.2d 280, 284 (4th Cir. 1977) (industrial development authority created by county board of supervisors is a state agency for limited purposes), *vacated*, 46 U.S.L.W. 3664 (U.S. Apr. 25, 1978) (No. 77-826) (remanded for further consideration in light of *City of Lafayette*).

74. See, e.g., *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 939 (D.C. Cir. 1971); *Ladue Local Lines, Inc. v. Bi-State Dev. Agency*, 433 F.2d 131, 136-37 (8th Cir. 1970); *E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52, 55-56 (1st Cir. 1966), *cert. denied*, 383 U.S. 947 (1966). See also *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123, 1141-43 (1978) (Burger, C.J., concurring in the judgment).

75. See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585 (1976); *City of Fairfax v. Fairfax Hosp. Ass'n*, 562 F.2d 280, 282 (4th Cir. 1977) (hospital association, a private nonprofit corporation, operating hospital that served the public), *vacated*, 46 U.S.L.W. 3664 (U.S. Apr. 25, 1978) (No. 77-826) (remanded for further consideration in light of *City of Lafayette*).

After determining the category to which the defendant belongs, the second step of the analysis is to decide whether, upon application of the relevant test, the defendant qualifies for immunity. The immunity of ultimate governmental bodies is tested under the basic *Parker* formula of whether the state, acting in its sovereign capacity, commanded the restraint. Under this standard, ultimate governmental bodies almost always attain immunity. This is reflected in the Court's cause-and-effect analysis in *Bates*: the Arizona Supreme Court "is the ultimate body wielding the State's power over the practice of law and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.'"⁷⁶ Courts will only deny immunity to an ultimate governmental body if it participates in a private scheme to restrain trade.⁷⁷

The tests for immunity of subordinate governmental bodies are more difficult to apply. The standard for state governmental subdivisions requires that the state legislature have directed or authorized the anticompetitive conduct.⁷⁸ Since "directed" is a stricter test than "authorized," the "directed or authorized" formula will, in practice, amount only to a question of whether the state legislature has authorized the challenged restraint. The *City of Lafayette* opinion does not make clear what measure of legislative review and approval constitutes authorization. The plurality did note that a state subdivision need not "point to a specific, detailed legislative authorization" and that "[a]n adequate state mandate . . . exists . . . [if] the legislature contemplated the kind of action complained of."⁷⁹ But the Court failed to specify what level of legislative "contemplation" satisfies the standard.⁸⁰ This produces a test of immunity that turns almost entirely on the facts of each case.

The test for the immunity of state agencies for limited purposes requires an equally extensive factual inquiry. In these cases, however, the standard is whether the restraint was compelled by the state acting as sovereign.⁸¹ State agencies for limited purposes do not so readily meet this test, since they are

76. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977) (citations omitted).

77. See *Harman v. Valley Nat'l Bank of Ariz.*, 339 F.2d 564 (1964); note 41 *supra* and accompanying text.

78. *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123, 1137 (1978).

79. *Id.* at 1138. (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1977)). But see *id.* at 1148 (Stewart, J., dissenting) ("[I]t is not clear from the plurality opinion whether a municipal government's actions will be immune from the Sherman Act if they are merely 'authorized' by a state legislature or whether they must be legislatively 'directed' in order to enjoy immunity.").

80. See *id.* at 1148 (Stewart, J., dissenting) ("[T]he plurality gives no indication of how specifically the legislature's 'direction' must relate to the 'action complained of.'").

81. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1974). The same test apparently applies to state proprietary enterprises. *City of Fairfax v. Fairfax Hosp. Ass'n*, 562 F.2d 280, 285 (4th Cir. 1977), *vacated*, 46 U.S.L.W. 3664 (U.S. Apr. 25, 1978) (No. 77-826) (remanded for further consideration in light of *City of Lafayette*).

less clearly identified with the sovereign than are ultimate governmental bodies.

Nongovernmental bodies must satisfy a still stricter test in order to obtain immunity. First, the state must have compelled any restraint that they impose.⁸² Second, the anticompetitive conduct must further a state policy.⁸³ Although the presence or absence of the latter factor may influence the determination of immunity for subordinate governmental bodies,⁸⁴ it becomes critical when a nongovernmental entity is the subject of the inquiry. In such cases, the court must find that the state policy was an important one,⁸⁵ and a private, nongovernmental body may have difficulty showing that it was entrusted with the implementation of such a policy.

III

APPLYING AMERICAN ANTITRUST LAWS TO FOREIGN GOVERNMENTS

As foreign governments become more heavily involved in American commerce,⁸⁶ the chance that their activities will violate U.S. antitrust laws increases.⁸⁷ The risk of liability largely disappears, however, if the *Parker* doctrine affords immunity to foreign as well as domestic states. The scope of foreign governmental immunity may in fact be greater than that of domestic states. U.S. courts have long recognized that attempts to apply the antitrust laws abroad may cause diplomatic friction,⁸⁸ and such friction seems especially likely when the activities challenged are those of a foreign government. The courts have therefore concluded that Congress did not intend the antitrust laws to apply in situations where international tension

82. Although nongovernmental bodies rarely attain immunity under the *Parker* doctrine, a number of state legislatures have exempted from antitrust liability the activities of industries regulated by a state public service commission. The scope of these statutory exemptions varies widely. See CONN. GEN. STAT. § 35-31(b) (Supp. 1978); CAL. PUB. UTIL. CODE § 8107 (West); Act of July 21, 1965, § 5(3), ILL. REV. STAT. ch. 38, § 60-5(3) (1975).

83. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585 (1976).

84. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public."); accord, *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123, 1137 (1978) (state policy to displace competition); *Parker v. Brown*, 317 U.S. 341, 363 (1943) (important state policy); cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792-93 (1974) (no important state policies involved).

85. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597-98 (1976). See note 84 *supra*.

86. See notes 1-4 *supra* and accompanying text.

87. It is settled that the antitrust laws may be applied to activities of foreigners outside the United States if those activities affect American commerce. See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

88. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). See generally *Baker, Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165 (1978); *Stanford, The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978).

would be likely to result.⁸⁹ Moreover, the principle of international comity entitles the interests of foreign governments to at least as much weight as those of domestic states,⁹⁰ and the "act of state" doctrine may prevent U.S. courts from scrutinizing a foreign government's actions at all.⁹¹

Nevertheless, just as state government instrumentalities do not necessarily enjoy the same immunity as do states themselves, foreign government instrumentalities need not enjoy the same immunity as do foreign governments.⁹² Since the courts generally exercise caution in applying the antitrust laws internationally, foreign government instrumentalities may in fact have more freedom to act than instrumentalities of domestic states.⁹³ But the strong interest of the United States in encouraging competition in both its domestic and its international commerce⁹⁴ entitles it to insist that any anticompetitive activities engaged in by foreign government instrumentalities meet the applicable test under *Parker* and its progeny before they are accorded antitrust immunity. *Parker* is not, however, the only source of immunity; the doctrine of sovereign immunity may exempt foreign government instrumentalities from liability under U.S. laws even when the *Parker* doctrine does not.

A. THE FOREIGN SOVEREIGN IMMUNITIES ACT

As the report of the House Judiciary Committee indicates, the Foreign Sovereign Immunities Act of 1976⁹⁵ "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts"⁹⁶ The Act confers

89. See, e.g., *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969); *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) ("Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.").

90. See generally RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter cited as RESTATEMENT] § 40 (1965).

91. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); RESTATEMENT, *supra* note 90, § 41 (1965). But see *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (plurality opinion) ("act of state" doctrine does not apply when the activities in question are purely commercial).

92. Compare notes 66-69 *supra* and accompanying text with notes 70-74 *supra* and accompanying text.

93. Where this greater freedom of action has led to monopoly or cartelization, one response has been concerted action by American businessmen. See *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), cert. denied, 98 S. Ct. 608 (1977); Davidow, *Antitrust, Foreign Policy and International Buying Cooperation*, 84 YALE L.J. 268 (1974).

94. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.").

95. 28 U.S.C. §§ 1602-1611 (1976).

96. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 12, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6610.

broad immunity on foreign states and their political subdivisions, agencies, and instrumentalities,⁹⁷ subject to several important exceptions.⁹⁸ One of these exceptions covers a foreign state's commercial activities: no immunity exists in any case

in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [when] that act causes a direct effect in the United States⁹⁹

The critical question, then, is how to distinguish commercial activities from all other governmental activities. The Act provides that the "commercial character" of any activity "shall be determined by reference to [its] nature . . . rather than by reference to its purpose."¹⁰⁰ Thus, if a particular government activity is one in which private enterprises also frequently engage, a court will probably consider it to be commercial, and the fact that the purpose of the activity may be the furtherance of a governmental function will be irrelevant.¹⁰¹ Significantly, many of the activities of foreign government instrumentalities to which U.S. antitrust laws might apply can be classified as commercial under this test. Where this is the case, these instrumentalities cannot obtain exemption simply by pleading sovereign immunity.

Instrumentalities of foreign governments may still enjoy antitrust immunity if they can satisfy the applicable *Parker* test. The commercial character of their activities should not prevent them from doing so, because these tests require a more discriminating analysis of the type of connection, if any, between the state and the alleged restraint of trade. In fact, several courts

97. 28 U.S.C. § 1603(a)-(b)(1976). An "agency or instrumentality of a foreign state" is defined as

any entity—

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

Id. § 1603(b). The House Report gives as examples of such entities "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is usable in its own name." H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 15-16, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6614. *Cf.* *Yessenin-Volpin v. Novosti Press Agency*, 46 U.S.L.W. 2398 (S.D.N.Y. Jan. 23, 1978) (Soviet press agencies did not engage in commercial activity in writing and publishing articles allegedly defaming plaintiff).

98. 28 U.S.C. § 1604 (1976).

99. *Id.* § 1605(a)(2).

100. *Id.* § 1603(d).

101. *Id.*

have rejected the distinction between commercial and political activities as a basis for deciding questions of antitrust immunity.¹⁰²

Therefore, a court presented with charges that a foreign government instrumentality has violated U.S. antitrust laws must answer three preliminary questions. First, does the Foreign Sovereign Immunities Act exempt the defendant from the jurisdiction of U.S. courts? This will turn on whether or not the defendant's activities are deemed commercial. If they are not, the court must dismiss the suit for lack of jurisdiction.¹⁰³ Second, are the alleged violations covered by the *Parker* doctrine? Here, the answer will depend upon the character of the instrumentality and whether it can satisfy the applicable *Parker* test. If it can, the court must dismiss the suit for failure to state a claim against the defendant.¹⁰⁴ Third, does the principle of comity bar the court in any event from entertaining the antitrust claim? The court can reach the merits of the case only if, after weighing the interests of the foreign state against those of the United States, it finds that the interests of the United States are predominant.¹⁰⁵ The following hypothetical case illustrates the method and problems of the proposed analysis of a foreign government instrumentality's antitrust liability.¹⁰⁶

B. A HYPOTHETICAL CASE

The Republic of Monopolis, concerned about its balance of payments and continued economic dependence on other nations, decides to establish a national shipping line.¹⁰⁷ It forms a state corporation for this purpose, entrusting management of the corporation to a board appointed by the Minister of Commerce.¹⁰⁸ The board has the power to direct day-to-day operations and to develop long-range plans, which are submitted to the Minister for review. After beginning operations, the board enters into an agreement with two privately owned shipping companies incorporated under the laws of a neighboring country. This agreement provides for various forms of cooperation in the transportation of goods to and from foreign

102. See *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974); *Ladue Local Lines, Inc. v. Bi-State Dev. Agency*, 433 F.2d 131 (8th Cir. 1970). *Contra*, *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123, 1142 (1978) (Burger, C.J., concurring in the judgment); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971).

103. FED. R. CIV. P. 12(b)(2).

104. FED. R. CIV. P. 12(b)(6).

105. RESTATEMENT, *supra* note 90, § 40.

106. Because of the factual inquiry needed to apply the appropriate *Parker* test, this case does not afford a basis for any conclusions concerning the scope of immunity of foreign government instrumentalities generally.

107. See Valente, *The Participation of Developing Countries in Shipping* INT'L CONCILIATION 27, 34 (Mar. 1971).

108. This corporation falls into the subcategory of governmental proprietary enterprises within the larger category of subordinate governmental bodies. See note 74 *supra* and accompanying text.

nations, including the United States. It also provides that none of the parties will enter into any similar agreements with other shipping lines. Because no copy of the agreement was filed with the Federal Maritime Commission for its approval,¹⁰⁹ the shipping line may not claim the anti-trust exemption that Commission approval confers.¹¹⁰ An American shipping company engaged in transporting goods between the United States and Monopolis brings suit against the parties to the agreement, alleging an illegal conspiracy in restraint of trade. Monopolis' shipping line moves to dismiss on the grounds of sovereign immunity and inapplicability of the U.S. antitrust laws to its activities.

In ruling on these motions, the court should first consider the question of sovereign immunity: if the shipping line is immune under the Foreign Sovereign Immunities Act, the plaintiff's case must be dismissed. The shipping line is certainly an instrumentality of the Republic of Monopolis.¹¹¹ The challenged agreement excludes an American shipping company from the cooperative scheme, and so is likely to have a direct effect in the United States. Immunity therefore depends upon whether or not the line entered into this agreement in connection with a commercial activity.¹¹² Since its activities promote Monopolis' economic independence, they may have a political purpose, but their nature is clearly commercial. The House of Representatives report on the Foreign Sovereign Immunities Act lists a foreign government's sale of a service as an example of commercial activity.¹¹³ Since operating a shipping line involves the sale of services,¹¹⁴ Monopolis' shipping line is not entitled to sovereign immunity.

The second question for the court is whether the alleged restraint of trade meets the applicable *Parker* test. The test applied in *City of Lafayette*,¹¹⁵

109. 46 U.S.C. § 814 (1976) requires that common carriers by water as defined in § 801 file with the Federal Maritime Commission every agreement

fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

110. 46 U.S.C. § 814 (1976) provides that "[e]very agreement . . . lawful under this section . . . shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15 [the Sherman and Clayton Acts]"

111. See note 97 *supra*.

112. See 28 U.S.C. § 1605(a)(2) (1976).

113. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 16, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6615.

114. See *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 811 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) ("[P]laintiffs, in participating in the market of supplying the service of transportation in United States-flag vessels, were engaged in foreign commerce of the United States.").

115. See text accompanying notes 78-79 *supra*.

which would require a showing that the state had authorized the shipping line to enter into an agreement that would exclude American shipping companies, may initially seem appropriate.¹¹⁶ The shipping line, however, resembles the bar associations in *Bates* and *Goldfarb* much more than it does a municipality. Its function is restricted to the transportation of goods between Monopolis and its trading partners, and it therefore appears to be a state agency for a limited purpose, as was the bar association in *Goldfarb*.¹¹⁷ Although the Minister of Commerce may review the board's decisions, it exercises considerable discretion in operating what is, after all, essentially a commercial enterprise.

If the appropriate test is the one applied in *Goldfarb* and *Bates*,¹¹⁸ the shipping line must, if it is to obtain immunity, show that the sovereign commanded it to enter into the challenged agreement. Because there is no indication that the Minister of Commerce ordered the board to enter into this agreement, the shipping line should not be immune from American anti-trust laws.

The court must still decide whether subjecting Monopolis' national shipping line to possible liability for violating U.S. law is consistent with international comity. This requires the court to balance the interests of Monopolis in the alleged restraint against those of the United States in its elimination.¹¹⁹ The question is essentially one of fairness. Monopolis' objectives in establishing a national shipping line are clearly very important, since they involve not only its desire for economic independence, but possibly its national security.¹²⁰ Yet there is nothing to suggest that an agreement that serves to exclude American shipping companies from a particular market is essential to the attainment of these objectives. Applying the antitrust laws to such an agreement would not, therefore, necessarily frustrate any fundamental policies of Monopolis, and would further the strong American interest in promoting free competition.¹²¹ In addition, the shipping line could have used an available procedure for obtaining exemption from the antitrust laws for the challenged agreement.¹²² Because the line did not follow this procedure, and because the result was an alleged restraint of trade not formally sanctioned by either the United States or Monopolis, comity should not prevent application of American antitrust laws to the activities of Monopolis' national shipping line.

116. The shipping line is closely tied to the state: its board of directors is charged with implementing important public policies and acts under the supervision of the Minister of Commerce. Moreover, because it is a state corporation, it serves no private interests.

117. See notes 52-53 *supra* and accompanying text.

118. See note 81 *supra* and accompanying text.

119. See note 90 *supra* and accompanying text.

120. See Valente, *supra* note 107, at 27.

121. See note 94 *supra*.

122. See notes 109-10 *supra*.

CONCLUSION

The antitrust liability of foreign government instrumentalities assumes increasing importance as foreign states expand their influence in the American economy. Although U.S. courts have rarely considered the question, the recent series of *Parker* doctrine cases in domestic antitrust law provides a useful framework for examining it. Such an examination indicates that foreign government instrumentalities may incur antitrust liability whenever they engage in commercial activity directly affecting American commerce. They can avoid liability only if the foreign state acting as sovereign has commanded or perhaps authorized the activity, or if international comity requires that the United States not apply its laws. But the effect of possible antitrust liability on the involvement of foreign governments in the American economy is still not clear.

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